No. 126, Original

In the Supreme Court of the United States

STATE OF KANSAS, PLAINTIFF

v.

STATE OF NEBRASKA AND STATE OF COLORADO

ON MOTION FOR LEAVE TO PETITION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, Kansas's motion for leave to file a petition should be granted. Nebraska should be invited to file a motion to dismiss to clarify what remedies are available to Kansas for Nebraska's alleged violation of the Compact. Nebraska should also be provided an opportunity to file a motion to assert its own claims against Kansas.

STATEMENT

The State of Kansas seeks leave to file a petition for the enforcement of the Final Settlement Stipulation (FSS) entered into by Kansas, Nebraska, and Colorado, and approved by the Court in its Decree of May 19, 2003. See Pet. App. B1-B57. In 1998, Kansas filed a complaint to enforce its rights under the Republican River Compact (Compact), which was approved by Con-

gress in the Act of May 26, 1943, ch. 104, 57 Stat. 86. See Pet. App. A1-A16. The FSS incorporates procedures to calculate each State's allocation, and establishes each State's requirements for Compact compliance. *Id.* at B26-B47.

A. The Republican River Basin

The Republican River Basin is a 24,900-square-mile watershed, approximately 430 miles in length, that encompasses parts of northeastern Colorado (7700 square miles), southwestern Nebraska (9700 square miles), and northern Kansas (7500 square miles). The Republican River originates in Colorado at the junction of the Arikaree and North Fork Republican Rivers, then flows northeast through the northwest corner of Kansas. The river crosses into Nebraska near Haigler, Nebraska, flows east across southwestern Nebraska, then crosses back into Kansas south of Hardy, Nebraska. From there, it flows southeasterly to Junction City, Kansas, where it joins the Smoky Hill River to form the Kansas River. The Basin includes numerous smaller streams that flow into the Republican River. The Basin, which is part of the Great Plains, is sparsely populated. It contains fertile farmland and typically receives from 18 to 30 inches of precipitation per year. See Bureau of Reclamation, U.S. Dep't of the Interior, *Resource Management Assessment: Republican River Basin* 3-6, 43, 44-48 (July 1996) (*Resource Management Assessment*) (a copy of this report was lodged with the Clerk of the Court in the 1998 proceeding in this case).

During the 1930s, the United States, as well as Colorado, Kansas, and Nebraska, developed an interest in harnessing the water resources of the Republican River Basin. The Basin had experienced an extended drought,

interrupted in 1935 by a deadly and destructive flood. The federal and state governments examined whether the Republican River's spring flows could be impounded in reservoirs for flood control and released in the late summer and fall for irrigation. See H.R. Doc. No. 842, 76th Cong., 3d Sess. (1940) (Corps of Engineers preliminary examination of Republican River); see also H.R. Doc. No. 195, 73d Cong., 2d Sess. 158-186 (1934) (United States Army Corps of Engineers (Corps) preliminary examination of Kansas River, discussing irrigation potential in Republican River Basin). Based on the Corps' recommendations, Congress authorized appropriations to construct the Harlan County Reservoir for flood control purposes in Nebraska, a short distance upstream from where the Republican River flows back into Kansas. See Act of Aug. 18, 1941, ch. 377, 55 Stat. 646.

During this time, the Interior Department's Bureau of Reclamation, which has primary responsibility for irrigation projects, also examined the Republican River Basin. See Bureau of Reclamation, U.S. Dep't of the Interior, *Project Investigations Report No. 41*, at 1-2 (1940). The Bureau concluded that development of federal irrigation projects in the Basin would be feasible. *Id.* at A-D (Synopsis). The Bureau indicated, however, that those projects should not be constructed until the three States had agreed to an interstate allocation of the Basin's water resources. *Id.* at 1 ("To avoid expensive litigation as a result of possible conflicting uses of water in the various states, further developments for irrigation should be preceded by a three-state compact or other similar agreement on use of water."). Colorado, Kansas, and Nebraska had been discussing the possibility of an interstate compact for several years, and they thereafter entered into negotiations over a potential compact.

B. The Compact Approval Process

The initial attempt to negotiate a compact met objections by federal agencies and failed when President Roosevelt vetoed the legislation necessary to approve the compact under the Constitution. U.S. Const. Art. I, § 10, Cl. 3; see 88 Cong. Rec. 3285-3286 (1942); H.R. Doc. No. 690, 77th Cong., 2d Sess. (1942) (veto message). Following the President's veto, Congress enacted legislation authorizing the States to conduct further negotiations, with participation by a federal representative. Act of Aug. 4, 1942, ch. 545, 56 Stat. 736. The state commissioners and the federal representative completed their negotiations on December 31, 1942, and the legislatures of Colorado, Kansas, and Nebraska ratified the proposed compact. Colo. Rev. Stat. Ann. §§ 37-67-101 *et seq.* (West 2010); Kan. Stat. Ann. § 82a-518 (1997); 2A Neb. Rev. Stat. Appx. § 1-106 (2008). Congress held hearings and enacted legislation approving the Compact, which the President signed. Act of May 26, 1943, ch. 104, 57 Stat. 86.[1]

C. The Republican River Compact

The Republican River Compact comprises 11 Articles that allocate the water supply of the Basin among Colo-

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[1] See S. 649, 78th Cong., 1st Sess. (1943); H.R. 1679, 78th Cong., 1st Sess. (1943); H.R. 2482, 78th Cong., 1st Sess. (1943); *Flood Control in the Basin of the Republican River: Hearing on S. 649 Before the Senate Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943); *Republican River Compact: Hearings on H.R. 1679 and H.R. 2482 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943); S. Rep. No. 152, 78th Cong., 1st Sess. (1943); H.R. Rep. No. 375, 78th Cong., 1st Sess. (1943); 89 Cong. Rec. 3549-3551 (1943) (Senate passage); *id.* at 4534-4536 (House passage); *id.* at 4907 (Presidential approval).

rado, Kansas, and Nebraska. Specifically, the Compact quantifies the Basin's "virgin water supply," which is defined as "the water supply within the Basin undepleted by the activities of man." Compact Art. II; Pet. App. A4. The Compact prescribes the specific quantities of the virgin water supply, in acre-feet per year, that each State is allocated for "Beneficial Consumptive Use," which is defined as "that use by which the water supply of the Basin is consumed through the activities of man * * * includ[ing] water consumed by evaporation from any reservoir, canal, ditch, or irrigated area." *Ibid.*

Article IV sets out the allocation to each State for each of the Basin's drainage areas. Compact Art. IV; Pet. App. A5-A8. Article IV allocates the entire estimated water supply, giving Colorado an aggregate of 54,100 acre-feet per year, Kansas an aggregate of 190,300 acre-feet per year, and Nebraska an aggregate of 234,500 acre-feet per year. Pet. App. A5-A7. In addition, Article IV recognizes that Kansas is entitled to "the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line." *Ibid.*

Article IX obligates the States to administer the Compact through appropriate officials and "to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact." Pet. App. A11. In accordance with Article IX, the States formed the Republican River Compact Administration (RRCA). The RRCA is comprised of the chief water official of each State, and "may, by unanimous action, adopt rules and regulations consistent with the provisions of th[e] compact." *Ibid.* The RRCA computes the Basin's annual virgin water supply, which al-

lows the States to determine, retrospectively, whether each State has stayed within its allocation. See RRCA, *First Annual Report for the Year 1960* (1961).

D. Post-Compact Federal Development

The Compact water allocations provided a basis for final planning of a system of federal reservoir and irrigation projects to assist each of the States in developing its allocated share of the Republican River. Congress authorized a system of projects as part of the Missouri River Basin Development Program. See Flood Control Act of 1944, ch. 665, § 9, 58 Stat. 891. That Program, also known as the Pick-Sloan Plan, authorized the Corps of Engineers and the Bureau of Reclamation to construct and operate a coordinated system of reservoirs for multiple purposes, including irrigation, flood control, power development, fish and wildlife protection, and recreation. See S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

Between the late 1940s and the 1960s, seven federal dams and reservoirs were constructed in the Basin above the Nebraska-Kansas border. Six are Reclamation projects, and Harlan County Reservoir is a Corps project. The Bureau's projects, operated in conjunction with the Corps' Harlan County facilities, have an active storage capacity of approximately 477,556 acre-feet of water and provide water to six irrigation districts serving 110,623 acres of farmland in the Basin. See *Resource Management Assessment* 4-5, 13-23.

E. Previous Litigation And The Final Settlement Stipulation

Beginning in the 1980s and continuing into the 1990s, Kansas complained to the RRCA that Nebraska was violating the Compact by allowing increasing groundwa-

ter development. RRCA, *25th Annual Report* 7 (1985). Specifically, Kansas complained that increased groundwater development in Nebraska was reducing the inflow of water into Harlan County Reservoir, which provides a significant part of the deliveries of Republican River water to Kansas. Br. in Support (Br.) 6. Nebraska took the position that groundwater pumping was not subject to the Compact.

In 1999, this Court granted Kansas's motion for leave to file a bill of complaint against Nebraska. *Kansas* v. *Nebraska*, 525 U.S. 1101. The Court invited Nebraska to file a motion to dismiss to test Nebraska's assertion that groundwater pumping was not subject to the Compact. 527 U.S. 1020 (1999). The Court appointed a Special Master and referred the motion to dismiss to him. 528 U.S. 1001 (1999). The Special Master recommended that Nebraska's motion to dismiss be denied, concluding that the Compact encompassed groundwater withdrawals that impacted the virgin water supply. See *Kansas* v. *Nebraska*, First Report of the Special Master (Subject: Nebraska's Motion to Dismiss). The Court denied Nebraska's Motion to Dismiss. 530 U.S. 1272 (2000).

The States then began negotiations to resolve the remaining issues in the suit. Following more than a year of additional negotiations, the States entered into the FSS, which was approved by the Court in its Decree of May 19, 2003. Pet. App. B1-B57; see 538 U.S. 720.

The FSS incorporates procedures to calculate the virgin water supply and each State's allocation, and it establishes each State's requirements for Compact compliance. Pet. App. B3-B57. Under the FSS, Nebraska's compliance requirements include: (1) a five-year running-average test limiting Nebraska's beneficial consumptive use to no more than its statewide allocation,

FSS Art. IV.D, Pet. App. B36; and (2) during water-short periods (Water-Short Year Administration), an additional two- or three-year running-average test limiting Nebraska's beneficial consumptive use above Guide Rock, Nebraska to no more than Nebraska's allocation above Guide Rock plus its share of any unused portion of Colorado's allocation. FSS Art. V.B, Pet. App. B38-B45. Water-Short Year Administration is in effect in those years in which the projected or actual irrigation supply is less than 119,000 acre-feet of storage available for use from Harlan County Reservoir. FSS Art. V.B.1; Pet. App. B38-B39.

The FSS also includes dispute-resolution provisions. Those provisions require the States first to submit their disputes to the RRCA for resolution. FSS Art. VII.A, Pet. App. B48-B50. If the RRCA cannot reach consensus, the parties may submit the dispute to non-binding arbitration under Article VII.B. FSS Art. VII.A.7, Pet. App. B50.

Through six months of additional technical work and negotiations under the FSS, the States reached agreement on a model for calculating the impacts of groundwater pumping and depletions in each State, which is known as the RRCA Groundwater Model. See *Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model* (Sept. 17, 2003); 540 U.S. 964 (2003) (noting filing of Final Report).

F. The Current Controversy

1. By 2007, several disputes arose among the States concerning compliance with the FSS. Kansas alleges that in 2005 and 2006, which was the first water-short accounting period, Nebraska overused its allocation by a total of approximately 79,000 acre-feet, in violation of

the FSS and the Compact. Pet. 9-10; Br. 22-24. Kansas further asserts that—other than in 2007-2009, which were relatively wet years—Nebraska's groundwater pumping has generally remained at or above the levels that led Kansas to file its complaint in 1998. Pet. 9; Br. 22-24. Nebraska does not dispute that it exceeded its allocation by an average of approximately 35,505 acre-feet per year in 2005 and 2006, but discounts the significance of doing so, on the ground that compliance was difficult given the drought conditions at the time. Resp. Br. 2, 19.

Kansas requested retrospective monetary damages in the form of disgorgement of Nebraska's profits from its overuse. Resp. Br. 8. Kansas also sought prospective relief to ensure Nebraska's future compliance, including the shutdown of wells within 2½ miles of the Republican River and its tributaries. *Ibid.* Nebraska rejected Kansas's demands, stating that Nebraska had identified errors that prevented an accurate accounting of each State's allocation by as much as 10,000 acre-feet per year, and that those errors should be corrected before the parties could determine the extent of the violation. *Id.* at 8-9, 24. As required by Article VII.A of the FSS, the States presented these issues to the RRCA. Br. 12; Resp. Br. 9. The RRCA could not reach a consensus on either issue.

2. Pursuant to Article VII.A.7 of the FSS, Kansas and Nebraska submitted their claims to non-binding arbitration before a mutually selected arbitrator. In an effort to narrow the scope of the proceedings, the arbitrator requested that the parties address several preliminary issues. Resp. App. 25-27. One was whether Nebraska was "subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as

monetary sanctions," or whether "any damages awarded to Kansas [should] be limited to actual damages." *Id.* at 26. The arbitrator concluded that any damages awarded to Kansas should be limited to actual damages. *Id.* at 51-61. After a hearing, the arbitrator concluded that Kansas "[c]learly * * * incurred damages resulting from Nebraska's overuse of water in 2005 and 2006[,] and those damages may well be in the range of one to several million dollars." *Id.* at 96. However, the arbitrator concluded that Kansas failed adequately to prove its damages and awarded only $10,000 in nominal damages. *Id.* at 96-97. The arbitrator noted that because the arbitration was non-binding, Kansas could submit additional proof "in arbitration supplemental to this present proceeding, * * * or such information can be presented during a determination of damages by the [Supreme] Court." *Id.* at 96.

The arbitrator also requested that the parties address at the outset whether Kansas's "proposed remedy for future compliance with the Republican River Compact and the [FSS is] a proper subject for this arbitration, and [whether] the U.S. Supreme Court [can] formulate and mandate a remedy for future compliance." Resp. App. 26-27. The arbitrator concluded that Kansas's requests for prospective relief were proper, *id.* at 61, and that Kansas was entitled to an injunction prohibiting Nebraska from exceeding its future allocations, *id.* at 103. The arbitrator declined to adopt Kansas's proposed limitation on Nebraska's groundwater use, concluding that Kansas's demands were more stringent than necessary to ensure Nebraska's compliance. *Id.* at 99. The arbitrator, however, admonished Nebraska to make further groundwater reductions, stating that Nebraska's updated Integrated Management Plans (IMPs),

which called for a 20% reduction in groundwater pumping, were "inadequate to ensure compliance with the Compact and FSS during prolonged dry-year conditions." *Id.* at 102. The arbitrator also rejected Kansas's proposal to appoint a river master to monitor Nebraska's compliance. *Id.* at 104.

With regard to Nebraska's proposed corrections to Compact accounting, the arbitrator concluded that Nebraska's proposals were "problematic" and would not be adopted. Resp. App. 84. The arbitrator, however, recommended that the RRCA reconvene the technical groundwater-modeling team to reevaluate the procedures for determining beneficial consumptive use. *Ibid.* Both States rejected the arbitrator's recommendations.

3. Having exhausted the FSS's alternative dispute resolution requirements, Kansas filed a motion for leave to file a petition in this Court. Kansas seeks an order adjudging Nebraska in contempt of this Court's 2003 Decree and retrospective monetary damages in the form of disgorgement of Nebraska's profits. Pet. 11-12. Kansas also seeks prospective relief, including: an order enjoining Nebraska from future violations and imposing preset sanctions for noncompliance, an order reducing groundwater pumping in Nebraska to a level sufficient to ensure Nebraska's future compliance, and appointment of a river master. *Id.* at 12.

Nebraska responds that Kansas's claims, standing alone, do not merit the exercise of the Court's jurisdiction. Resp. Br. 19-23. Nebraska contends, however, that the Court should assume jurisdiction to resolve Nebraska's claim that it has discovered an error in the FSS Accounting Procedures that is causing the RRCA to miscalculate each State's allocation by as much as 10,000 acre-feet per year. *Id.* at 24. Nebraska also contends

that the Court should consider its claim that the Compact accounting procedures must be amended to give Nebraska credit for any damages it may pay to Kansas for past violations, which Nebraska submitted to a separate non-binding arbitration. *Id.* at 26-27.[2]

DISCUSSION

The Court should grant Kansas leave to file its petition. Kansas alleges an interstate dispute, involving an alleged violation of this Court's decree, that is of sufficient importance to warrant this Court's exercise of its original jurisdiction, and there is no other forum in which the controversy practicably can be resolved. The United States additionally suggests that this Court provide a mechanism for the parties to address certain threshold legal issues. Resolution of those issues, which could be placed before the Court in a motion to dismiss, would significantly narrow the scope of any proceedings before a Special Master. In addition, the Court should allow Nebraska to file a motion to assert its own claims against Kansas if it wishes to pursue those claims before this Court.

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[2] Shortly before Kansas filed its petition, the States entered into a second arbitration proceeding, which addressed two issues: (1) Nebraska's credit accounting issue described above, and (2) the propriety of Colorado's proposed Compact Compliance Pipeline (CCP) as a means of offsetting stream depletions. Resp. Br. 26-27. The arbitrator issued two decisions on October 7, 2010, in which she generally agreed with Kansas and did not recommend adopting either proposal. See Arbitration's Final Decision on Nebraska Crediting Dispute, http://www.ksda.gov/includes/document_center/interstate_water_issues/RRC_Docs/2010_10_07_Pagel_decision_Nebraska_crediting.pdf, and Arbitrator's Final Decision on Colorado Compliance Pipeline Dispute, http://www.ksda.gov/includes/document_center/interstate_water_issues/RRC_Docs/2010_10_07_Pagel_decision_Colorado_Pipeline.pdf.

A. Kansas's Petition Pleads A Controversy That Warrants The Exercise Of Original Jurisdiction

This Court has original and exclusive jurisdiction over a case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767, 771-772 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317- 319 (1907). The Court has determined that its exercise of original jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); *Texas* v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file in a dispute arising under its exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (internal quotations and citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Applying those standards, Kansas's petition presents a matter warranting the exercise of original jurisdiction.

1. In claiming that Nebraska is depriving Kansas of its lawful share of the water of an interstate river, Kansas asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Texas* v. *New Mexico*, 462 U.S. at 567; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185

U.S. 125 (1902). Indeed, the Court has previously granted Kansas leave to file a complaint in this very case, *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999), and Kansas now alleges that Nebraska has violated the FSS that was approved in the Court's final decree.

a. Kansas is entitled to prove its retrospective damages for Nebraska's alleged violations of the Compact and the FSS. The Compact places enforceable limitations on the compacting States' consumption of water that is diverted from streams within the Basin. The Court has recognized that it has power to adjudicate disputes among the States and "to provide one State a remedy for the breach of another." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). That power includes "rectifying a failure to perform in the past" under a Compact. *Ibid.*; *id.* at 129 ("New Mexico cannot escape liability for what has been adjudicated to be past failures to perform its duties under the Compact.").

In addition, even without demonstrating injury, Kansas may be entitled to an order adjudicating Nebraska in contempt of this Court's 2003 Decree approving the FSS. In *Wyoming* v. *Colorado*, 309 U.S. 627 (1940), Wyoming sought relief for violation of this Court's decree apportioning an interstate stream by limiting withdrawals in Colorado. See *Wyoming* v. *Colorado*, 298 U.S. 573 (1936). The Court rejected Colorado's defense that Wyoming had not been injured, explaining that the Court's decree had "fixed the amount of water" to which each State was entitled, and that Colorado was "bound by the decree not to permit a greater withdrawal." *Id.* at 581. The Court concluded that if Colorado violated the decree, it was "not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights," and that even if no injury was shown, "it

would be [the Court's] duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree." *Ibid.*[3]

Although they disagree about the extent of the violation, the States agree that Nebraska exceeded its Compact allocation during 2005 and 2006, which is a violation of this Court's Decree approving the FSS. Pet. 9-10; Br. 22-24; Resp. Br. 2, 19. The States cannot agree on what damages are appropriate for that violation, and the States have attempted to resolve the dispute through the FSS's dispute-resolution mechanism. As the arbitrator recognized, the next step is for Kansas to seek a determination of damages in this Court. Resp. App. 96.

b. The issue of Kansas's entitlement to prospective remedies to ensure Nebraska's future compliance with the Compact and the FSS is also a proper subject for this Court's consideration, although it is unclear whether such remedies are warranted at this time. Kansas seeks several prospective remedies, including an order enjoining Nebraska from future violations and imposing preset sanctions for noncompliance; an order directing Nebraska to reduce groundwater pumping to a degree sufficient to ensure compliance; and the appointment of a river master. Pet. 12-13.

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[3] See also *Nebraska* v. *Wyoming*, 507 U.S. 584, 589, 592 (1993) (granting Nebraska leave to file petition to enforce 1945 Decree apportioning Platte River and holding that in an action enforcing an interstate apportionment, "the plaintiff need not show injury"); *New Jersey* v. *New York City*, 290 U.S. 237 (1933) (granting New Jersey leave to file petition for order to show cause why New York City should not be held in contempt for violating Court's 1931 Decree enjoining City from dumping garbage off New Jersey's coast); *Wisconsin* v. *Illinois*, 287 U.S. 568 (1932) (granting Wisconsin's request for rule to show cause why Illinois had not taken appropriate steps to effect compliance with requirements of Court's decree).

This Court has previously granted relief enjoining a State from violating a compact and delineating preset sanctions for future violations. In *New Jersey* v. *New York City*, 290 U.S. 237 (1933), the Court enjoined New York City from dumping garbage off the coast of New Jersey in violation of an earlier decree and specifying that if the City failed to comply with the injunction, it "shall pay to [New Jersey] $5,000 a day until it does so comply." *Id.* at 240. Kansas cites no other examples of preset sanctions, and the arbitrator in this case determined that preset sanctions would not be appropriate, Resp. App. 103, but the decision whether to impose such sanctions of course remains this Court's prerogative.

Kansas's other demands for prospective relief are similarly available in principle, even if they might prove to be unwarranted in this case. Specifically, the Court would need to consider whether Kansas's request (Pet. 12) that the Court order Nebraska "to reduce groundwater pumping * * * sufficient to ensure Decree compliance in the future" is appropriate under the FSS. The FSS is "a legal document that must be construed and applied in accordance with its terms," *Texas* v. *New Mexico*, 482 U.S. at 128 (citations omitted), and the FSS allows Nebraska to come into compliance with its Compact obligations in a variety of ways. Thus, Article V.B.2 of the FSS states that during water-short years, Nebraska "may use one or more" of several listed measures to come into compliance with the limitations imposed on its consumptive beneficial use, only one of which is adjusting groundwater use. Other options include supplementing the surface water supply, leasing water rights, and implementing "any other measure that would help Nebraska limit Computed Beneficial Consumptive Use above Guide Rock to not more than that portion of Ne-

braska's allocation." Pet. App. B40-B41. Similarly, although the Court has previously appointed a river master to monitor and ensure compliance with an interstate compact, see, *e.g.*, *Texas* v. *New Mexico*, 482 U.S. at 134, the Court has "taken a distinctly jaundiced view of appointing an agent or functionary to implement [its] decrees." *Ibid.*; see also *Kansas* v. *Colorado*, 543 U.S. 86, 93 (2004) (refusing to appoint river master, in part because parties could resolve disputes through arbitration).

Regardless of whether Kansas's requests for injunctive relief would ultimately be awarded, this Court has power to impose prospective remedies to enforce an interstate compact or consent decree, see, *e.g.*, *Texas* v. *New Mexico*, 482 U.S. at 132-133, and some prospective remedies may be warranted in this case. Surface water flows in the Basin have declined significantly since the mid-1960s, and inflows to federal reservoirs in the Basin have declined steadily. *Resource Management Assessment* 13-15. There is a strong correlation between the decline in surface flow and the increase of groundwater well-development in Nebraska. HDR Consultants, *Hydrologic Trends and Correlations in the Republican River Basin in Nebraska* 1-14 (June 2006) (prepared for Neb. Dep't of Natural Resources).

Nebraska's noncompliance with its compact obligations has negative impacts on the interests of the United States. Further decline in irrigation water supply could cause water users to default on repayment and water-supply contracts with the United States, thus potentially reducing revenues needed to repay project costs associated with those contracts. Further, if the Bureau cannot exercise its state-held water rights to provide a water supply to irrigation districts as required by its repay-

ment contracts, those water rights could be injured. In addition to these risks, a decline in water supply harms fish, wildlife, and recreation in federal reservoirs, thus reducing the Bureau's ability to deliver the full range of benefits envisioned and authorized by Congress.

Nebraska contends that Kansas's requests for prospective remedies are "moot" because Nebraska is currently developing third-generation IMPs that would require Nebraska to reduce groundwater pumping even more than the 20% reduction required by the second-generation IMPs. Resp. Br. 21-22. It is far from clear that these further reductions would ensure that Nebraska would be able to comply with its Compact obligations. Reclamation's analysis concludes that the newest iterations of the IMPs do not adequately address groundwater pumping, and may compromise Nebraska's ability to remain in compliance. See Reply App. A1-A2, A7-A14 (Reclamation's statement regarding proposed IMPs for Upper Republican natural resources district).[4]

2. The final consideration is whether there is some other available forum for potential resolution of the dispute. Kansas seeks enforcement of a decree previously entered by the Court in this case, which is within the Court's exclusive original jurisdiction. Kansas and Ne-

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[4] On September 20, 2010, Nebraska approved third-generation IMPs for the Upper and Middle Republican Natural Resources Districts. See Nebraska Dep't of Natural Resources, Order Adopting Upper Republican Natural Resources District Integrated Management Plan & Associated Surface Water Controls (Sept. 20, 2010); Nebraska Dep't of Natural Resources, Order Adopting Middle Republican Natural Resources District Integrated Management Plan & Associated Surface Water Controls (Sept. 20, 2010). Five of Nebraska's irrigation districts have filed administrative appeals of those new requirements, four of which hold contracts with the Bureau. The Bureau plans to intervene in those administrative appeals.

braska agree that the RRCA is deadlocked on these issues, and the parties have exhausted the FSS's arbitration requirement. This consideration therefore militates in favor of the exercise of this Court's original jurisdiction. See *Texas* v. *New Mexico*, 462 U.S. at 568-570.

B. Before Referring The Matter To A Special Master, This Court Should Provide For Resolution Of Threshold Legal Issues

Upon granting leave to file a petition, the Court typically directs the defendant to file an answer and then refers the matter to a Special Master to conduct appropriate proceedings. See, *e.g.*, *New Jersey* v. *New York*, 511 U.S. 1080 and 513 U.S. 924 (1994); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987). In certain situations, however, this Court has resolved preliminary or controlling legal issues before, or in lieu of, referring the case to a Special Master. See *United States* v. *Alaska*, 499 U.S. 946 (1991); 501 U.S. 1248, 1275 (1991); 503 U.S. 569 (1992); *United States* v. *California*, 332 U.S. 19, 20-24 (1947). This case is one in which the latter course might be followed.

Nebraska and Kansas disagree over what monetary damages would be recoverable for past violations of the Compact and FSS. Specifically, Kansas believes that the Court should enter an order adjudicating Nebraska in contempt of this Court's 2003 decree and requiring disgorgement of Nebraska's profits from overusing its allocation. Pet. 12. Nebraska contends that Kansas may recover only its actual damages, which it asserts are *de minimis*. Resp. Br. 19-20. Nebraska also contends that Kansas's requests for prospective relief—which include an order enjoining Nebraska from future violations and imposing preset sanctions for noncompliance, an order

directing Nebraska to reduce groundwater pumping to a degree sufficient to ensure compact compliance, and the appointment of a river master—are "moot" because Nebraska has revised the IMPs on which Kansas's calculations are based to further reduce groundwater pumping, and Nebraska maintains that it is taking measures to ensure that it will be in compliance with the FSS in the future. Resp. Br. 16-17, 20-23. If this case were governed by the Federal Rules of Civil Procedure, Nebraska would be entitled to test its theory by moving to dismiss Kansas's complaint for failure to state a claim on which relief may be granted. See Fed. R. Civ. P 12(b)(6). Although the Federal Rules are not strictly applicable here, they provide a guide to the Court's proceedings. See Sup. Ct. R. 17.2. The Court may wish to apply the procedure suggested by Rule 12(b)(6) to facilitate the disposition of this action. See, *e.g.*, *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999). The arbitrator followed a similar course in this case. Resp. App. 24-27 (identifying preliminary legal issues before proceeding to evidentiary hearing).

If the Court concludes that the Compact and FSS do not authorize some or all forms of damages that Kansas has demanded, the Court can issue an order that significantly limits the scope of any subsequent damages hearing conducted before a Special Master. The Court's decision would assist in managing discovery and trial, and might encourage renewed negotiations and settlement. See *Texas* v. *New Mexico*, 462 U.S. at 574-576.

Because the Court uses the Federal Rules of Civil Procedure as merely a guide to the conduct of original actions, it may tailor appropriate procedures to facilitate its decision-making process. See *Alaska*, 501 U.S. at 1248; *Alaska*, 501 U.S. at 1275. We therefore suggest

that, if the Court decides to grant Nebraska leave to file a motion to dismiss, the Court may wish to identify grounds, drawn from the filings thus far, that might be addressed in such a motion. See pp. 15-18, *supra*. If the Court invites the filing of such a motion, and once appropriate responses are filed, the Court could decide at that point to refer the motion to a Special Master to consider in the first instance.

C. Nebraska Should Be Required To File A Motion If It Wishes To Prosecute A Counterclaim

In its response to Kansas's petition, Nebraska asserts that the Court should assume jurisdiction to adjudicate other disputes between the States concerning Compact administration. Specifically, Nebraska contends the Court should resolve the dispute raised by Nebraska in the 2008 arbitration concerning putative errors in the Compact accounting procedures, and the dispute raised by Nebraska in the 2010 arbitration that the Compact accounting procedures should be amended to give Nebraska credit for any damages that it may pay to Kansas for past violations. Resp. Br. 24-27.[5]

It is premature to address whether the Court should resolve these additional issues. Although it is clear that appropriate counterclaims may be filed in an original action, see, *e.g.*, *Nebraska* v. *Wyoming*, 481 U.S. 1011 (1987), Nebraska has not filed a motion seeking leave to file counterclaims articulating their bases and demonstrating why they should be joined in this action. See Sup. Ct. R. 17.3 (requiring an "initial pleading * * * preceded by a motion for leave to file"). The Court has

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[5] Nebraska suggests that Colorado is likely to make its own request to have the CCP issue included in this action. Resp. Br. 27. However, Colorado has not yet made such a request.

declared that these initial pleading requirements "serv[e] an important gatekeeping function" in original actions. *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995) (citations omitted); see also *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973) ("[T]he requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage.") (citations omitted).

Without a pleading that enunciates Nebraska's specific allegations and prayer for relief, the Court cannot determine precisely what factual and legal issues Nebraska would raise. Thus, the Court could not address at this stage whether Nebraska's contentions bear a sufficient relationship to Kansas's claims to be joined in this proceeding. Cf. *Nebraska* v. *Wyoming*, 515 U.S. at 8 ("[P]roposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings.") (citations omitted). Accordingly, Nebraska should be required to file an appropriate motion if it wishes to prosecute a counterclaim.

CONCLUSION

Kansas should be granted leave to file its petition. Nebraska should be invited to file a motion to dismiss to clarify what retrospective and prospective remedies are available to Kansas for Nebraska's alleged violation of the Compact and 2003 decree, and Nebraska should be provided an opportunity to file a motion asserting its own claims against Kansas if it wishes to pursue them here.

Respectfully submitted.

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